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Regulatory
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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Mental Health, Mental Retardation and Substance Abuse Board
Virginia Administrative Code (VAC) citation	12VAC35-45-10 et seq
Regulation title	Regulations for Providers of Mental Health, Mental Retardation, Substance Abuse, and Brain Injury Residential Services for Children
Action title	Addition of provisions for licensing providers of brain injury services.
Document preparation date	September 15, 2005

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

Chapter 725 of the 2005 Virginia Acts of Assembly (HB2826) requires that the State Mental Health, Mental Retardation and Substance Abuse Services Board adopt regulations for licensing providers of brain injury services. This legislation also requires that the provisions of the Act become effective within 280 days of its enactment. The Board is adopting these emergency regulations to comply with this legislation.

This action will amend the existing Regulations for Providers of Mental Health, Mental Retardation, Substance Abuse Residential Services for Children to include provisions for licensing providers of brain injury services. The existing regulations provide standards for licensing providers of residential treatment services for children with mental illness, mental retardation or substance use disorders and are an addendum to 22VAC42-10-10 et seq., which are generic standards governing a wide variety of residential facilities licensed by the Departments of Mental Health, Mental Retardation and Substance Abuse Services (Department), Social Services, Education, and Juvenile Justice. The standards in this addendum or "Mental Health Module" as it is operationally called, cover a wide range of residential services from small group homes to large residential treatment facilities. The proposed regulatory action adds a definition of "brain injury" and incorporates brain injury service into the definition "services" that are governed by this regulation. Several other definitions have been added or revised to encompass brain injury services. The regulations have been revised to require providers of brain injury services to maintain policies and structured programs to reduce or ameliorate the effects of brain injury and adds "neurobehavioral service" to the scope of services that may be part of a structured program. The amended regulation also includes requirements for the staff and supervision of residential facilities for persons with brain injury.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The State Mental Health, Mental Retardation and Substance Abuse Services Board (Board) has the statutory authority to adopt the proposed regulations under Va. Code § 37.1-10 and Chapter 725 of the 2005 Virginia Acts of Assembly.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This regulatory action will add provisions to the existing Mental Health Module to enable the Department to license providers of services under the Medicaid brain injury waiver and residential services for individuals with brain injuries. Virginia does not currently have a brain injury waiver but is requesting this waiver from the federal government. For this waiver to be approved, there must be a licensing mechanism in place. There has been no recognized mechanism to license residential services for individuals with brain injuries and some applicants have been denied licensing as a result. This will allow these services to operate in Virginia. Some services have been licensed as assisted living facilities and will be transferred to the Department.

The agency has developed the regulations in collaboration with the Department of Rehabilitative Services and representatives of various stakeholder groups. The regulation is intended to establish a framework for licensing providers of brain injury services to ensure there is appropriate oversight, support, and resources to provide an acceptable standard of care for persons who receive services.

Substance

Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10		This section provides definitions of terms that are relevant to the current regulations. Terms that are specifically applicable to brain injury services and providers are not used in the current regulations and not defined in this section.	Changes have been made to the definitions of “care;” “residential treatment program;” and “service.” Each definition has been expanded to encompass brain injury services or facilities, as appropriate. The definition of “service” is expanded to include “planned individualized interventions intended to reduce or ameliorate the effects of brain injury. This will allow the Department to license residential programs that provide brain injury services under these regulations. Definitions are added for “brain injury;” and “neurobehavioral service.” These terms are used in new provisions for brain injury services. The definitions are intended to clarify and facilitate the implementation of the new regulatory requirements.
80C		The current provision requires service providers to have and implement written policies for structured programs for the care and treatment of facility residents with mental illness, mental retardation, and substance abuse. This section also lists the types of services or interventions that may be provided to residents of facilities.	The requirement has been expanded to require policies for persons with brain injury in a residential service. “Neurobehavioral services” is added to the list of services that are provided to the residents of facilities.
80D		The current section requires providers to have formal arrangements for evaluation, assessment, and treatment of the mental	This provision has been expanded to require providers to assess the brain injury needs of residents.

		health needs of residents.	
210			This new section has been added to the regulations requiring that providers of services to persons with brain injury employ or contract with staff with the credentials that are considered appropriate for the type of services provided.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.

There are no appropriate alternatives to this regulatory action. The agency is required to adopt emergency regulations to implement the provisions of the Chapter 725 of the Virginia 2005 Acts of Assembly. The agency has developed the regulations in collaboration with a stakeholder group, which included representatives of the Virginia Department of Rehabilitative Services, providers, and community organizations with an interest in brain injury services. This group considered various alternatives for meeting the requirements of the legislation. The agency intends continue to work in collaboration with the stakeholders over the next twelve months to adopt permanent regulations to replace the emergency regulations.

Family impact

Please assess the impact of the emergency regulatory action on the institution of the family and family stability.

This regulatory action will implement requirements for licensing providers of services for persons with brain injury. The licensing standards will provide a means regulatory oversight and accountability of service providers. This should have a positive impact on the stability the families of persons with brain injury by promoting the quality of service and an acceptable standard of care.